FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. McCREE, JR.,
Solicitor General,
JOHN H. SHENEFIELD,
Assistant Attorney General,
LAWRENCE G. WALLACE,
Deputy Solicitor General,
FRANK H. EASTERBROOK,
Assistant to the Solicitor General,
BARRY GROSSMAN,
ROBERT B. NICHOLSON,
BRUCE E. FEIN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

*Additional captions inside of cover.

CHANNEL TWO TELEVISION COMPANY, ET AL., PETITIONERS

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.

NATIONAL ASSOCIATION OF BROADCASTERS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, PETITIONER

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.

ILLINOIS BROADCASTING COMPANY, INC., ET AL., PETITIONERS

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.

THE POST COMPANY, ET AL., PETITIONERS

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (A. 339–431) is reported at 555 F. 2d 938. The opinion on the Commission's motion for stay of mandate (A. 435–444) is reported at 555 F. 2d 967. The orders of the Commission (App. 134–316, 317–336) are reported at 50 F.C.C. 2d 1046 and 53 F.C.C. 2d 589.

JURISDICTION

The judgment of the court of appeals (A. 432–434) was entered on March 1, 1977. The petition for a writ of certiorari in No. 76–1471 was filed on April 22, 1977. The petition in No. 76–1521 was filed on May 2, 1977, the petition in No. 76–1595 on May 13, the petition in No. 76–1604 on May 16, the petition in No. 76–1624 on May 20, and the petition in No. 76–1685 on May 27. The petitions were granted and the cases were consolidated on October 3, 1977. The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and 2350(a).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has the authority to adopt a rule that would prohibit the issuance or transfer of any broadcast license to a person who controls a daily newspaper published in the community to which the broadcast license pertains.

2. Whether the Commission's decision not to allow the creation of new co-located newspaper-broadcast combinations was arbitrary or unreasonable.

3. Whether the Commission's decision to insulate existing non-monopoly newspaper-broadcast combinations from challenge was a rational application of the Commission's own principles.

4. Whether the court of appeals exceeded its authority by ordering the Commission to adopt a rule requiring the separation of existing newspaper-broadcast combinations rather than simply remanding the case to the Commission.

STATEMENT

A. BACKGROUND

The Federal Communications Commission for many years has recognized that diversity in the sources of public information serves the public interest. Since the early 1940s the Commission has prohibited any party from owning or controlling more than one broadcast station in the same broadcast service in the same area. See, *e.g., Order 84–A: Multiple Ownership of Standard Broadcast Stations,* 8 Fed. Reg. 16065 (1943).[1] The Commission early held that diversification of mass media ownership is important. The Commission allowed newspapers to acquire local broadcast licenses when necessary to promote broadcasting;[2] but where there have been competing applicants, the Commission, in order to promote diversity of media ownership, in appropriate cases has refused

[1] In *Order 84–A* the Commission barred ownership of more than one AM radio station in the same community by the same person; it ordered the separation of all existing combinations within six months. *Id.* at 16065.

[2] An early investigation of the propriety of newspaper ownership of FM stations ended without the adoption of any rules, but the Commission stated that it would consider the issue on a case-by-case basis. *High Frequency Broadcasting Stations (FM)*, 6 Fed. Reg. 1580, 3302 (1941); 9 Fed. Reg. 702 (1944).

to grant a broadcast license to a person controlling or publishing a newspaper in the same city. See, *e.g., Scripps-Howard Radio* v. *Federal Communications Commission,* 189 F. 2d 677 (C.A. D.C.), certiorari denied, 342 U.S. 830; *McClatchy Broadcasting Co.* v. *Federal Communications Commission,* 239 F. 2d 15 (C.A. D.C.), certiorari denied, 353 U.S. 918.

In 1965 the Commission stressed that "a maximum diffusion of control of the media of mass communications" is one of the "primary objectives toward which the process of comparison [in licensing] should be directed." *Policy Statement on Comparative Broadcast Hearings,* 1 F.C.C. 2d 393, 394. This 1965 *Policy Statement,* which directly governed only comparative hearings for new licenses, was applied the same year to comparative renewals. *Seven (7) League Productions, Inc.,* 1 F.C.C. 2d 1597.[3]

In 1968 the Commission proposed rules that would prohibit one person from owning or controlling more than one full-time broadcast station in the same area. *Notice of Proposed Rule Making: Multiple Ownership (Docket 18110)*, 33 Fed. Reg. 5315.[4] The Commission adopted these rules in 1970. *First Report and*

[3] See also *WHDH, Inc.*, 16 F.C.C. 2d 1, 17 F.C.C. 2d 856, affirmed *sub nom. Greater Boston Television Corp.* v. *Federal Communications Commission*, 444 F. 2d 841 (C.A. D.C.), certiorari denied, 403 U.S. 923; *A. H. Belo Broadcasting Corp.*, 47 F.C.C. 2d 540.

[4] The Commission did not propose to end existing combinations; the rule was to be applied only to new station applications, assignments of licenses or transfers of control. *Memorandum Opinion and Order: Multiple Ownership (Docket 18110)*, 12 F.C.C. 2d 912. See also A. 67–69.

Order, 22 F.C.C. 2d 306 (A. 33–100). The Commission stated that "centralization of control over the media of mass communications is, like monopolization of economic power, *per se* undesirable. * * * It is accordingly firmly established that in licensing the use of the radio spectrum for broadcasting, we are to be guided by the sound public policy of placing into many, rather than few hands, the control of this powerful medium of public communication" (A. 41). The Commission continued: "the governing consideration here is power, and power can be realistically tempered on a structural basis. It is therefore no answer to the problem to insist upon a finding of some specific improper conduct or practice. The effects of joint ownership are likely in any event to be so intangible as not to be susceptible of precise definition" (A. 43). The Commission also stated (*ibid.*) that "[a] proper objective is the maximum diversity of ownership that technology permits in each area."

Although the Commission did not then require existing combinations to be dissolved, it set that question for additional consideration (A. 67–69). It reiterated that common ownership of daily newspapers and broadcast stations serving the same area reduced the opportunity for the expression of diverse community viewpoints, and concurrently with its *First Report* commenced a further investigation of that problem in 1970. *Further Notice of Proposed Rulemaking* (*Docket 18110*), 22 F.C.C. 2d 339 (A. 101–

126). The Commission stated that common ownership of co-located newspapers and television stations was a matter of special concern, because "the public looks primarily to these two sources for its news and information on public affairs" (A. 111). It proposed a rule which would effectively limit any person to operation of one television station, one AM–FM radio combination, or one or more newspapers in the same market; persons would have five years in which to comply (A. 116). The Commission predicted that stations would be swapped[5] or sold with favorable tax treatment,[6] and that requiring compliance in five years would cause no more than minimal losses to investors (A. 118–119).

B. THE COMMISSION'S DECISION

In 1975, five years after issuing the notice of proposed rulemaking, the Commission announced its *Second Report and Order,* 50 F.C.C. 2d 1046 (A. 134–316). It prohibited the creation, by initial licens-

[5] The owner of a daily newspaper and broadcast license in city A could comply with the proposed ruling by swapping or exchanging its broadcast license in city A for a broadcast license in city B. For example, petitioner Post Co., licensee of WTOP–TV, Washington, and the *Detroit News*, licensee of WWJ–TV, Detroit recently announced that they would exchange stations. See *Washington Post*, December 7, 1977, p. 1.

[6] The Commission stated that it would certify sales as "necessary" to comply with its rules and thus make any resulting gains eligible for favorable tax treatment under Section 1071 of the Internal Revenue Code of 1954, 26 U.S.C. 1071 (A. 119).

ing or transfer, of new co-located newspaper-broadcast station combinations.[7] Once more the Commission emphasized the "sound public policy of placing into many, rather than a few hands, the control of the broadcast medium" (A. 142).

Noting the maturity of the broadcasting industry and the limited number of existing newspaper and television outlets in most communities, the Commission concluded that "new licensing should be expected to add to local diversity" (A. 191).

The Commission reaffirmed the finding it had made at the start of the rulemaking that broadcast stations, especially television, and daily newspapers are the public's main source of news and public affairs information (A. 208). Moreover, it emphasized that broadcast frequencies are scarce and that daily newspapers are even fewer and decreasing in number (A. 191; see also A. 971–974).[8] It found that 79 television

[7] The Commission decided not to bar the creation of additional AM–FM radio combinations, although it stated that the policy favoring diversity would be considered in individual licensing proceedings (A. 146–153). Although the Commission recognized that there are substantially more radio stations than television stations, it applied the prohibition to newspaper-radio combinations. It emphasized that "we wish to encourage still greater diversity * * * [and that this] is a worthwhile goal which does not depend on its being urgent to be justified" (A. 193).

[8] The number of cities with competing newspapers decreased from 117 in 1945 to 55 in 1973; in 20 of those 55 cities, the competing newspapers have joint operating arrangements. RAND Corporation Study R–1584–NSF, pp. 35–36. In 57 of the 74 cities where there were newspaper-television combinations, there is only one newspaper. In 30 of the 74 Standard Metropolitan Statistical Area ("SMSAs") involved there is only one daily newspaper; in

stations in 74 cities were under common control with daily newspapers published in the same cities (A. 201 n. 29).[9]

The Commission stated that "the idea of diversity of viewpoints from antagonistic sources is at the heart of the Commission's licensing responsibility. If our democratic society is to function, nothing can be more important than insuring that there is a free flow of information from as many divergent sources as possible. * * * [I]t is unrealistic to expect true diversity from a commonly owned station-newspaper combination" (A. 200).

Nonetheless, the Commission substantially immunized existing newspaper-broadcast combinations from challenge on diversity grounds and stated that existing combinations would not be disestablished.[10] The

20 other SMSAs there are only two daily newspapers, and in 11 of these, the newspaper that owns a local television station has more than 75 percent of the area's newspaper circulation (computed from RAND Corporation Study R–1585–MF, Table 8 (A. 971–974).

[9] Baltimore, Chicago, Dallas, St. Louis, and Washington, D.C., each had two combinations. RAND Corporation Study R–1585–MF, Table 7 (A. 967–970).

[10] The Commission both declined to adopt a rule requiring dissolution of existing combinations and held that it would not grant a hearing on issues of diversity or competition in individual license proceedings involving petitions to deny license renewal, unless there were allegations of specific abuses or of monopolization (A. 218). It held that in comparative renewal hearings (where another party seeks the license that the incumbent wants renewed), although such issues could be heard, they would not lead to a general restructuring beyond that accomplished in the rulemaking (*ibid.*).

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Commission concluded that in the case of incumbents (but not for new applicants) the interests of diversity were outweighed by concern for other values. The other values were (A. 196–197): (1) preserving local ownership and owner involvement with management; (2) protecting against "economic dislocation;" and (3) preventing disruption and instability of licensees' service. The Commission stated that "stability and continuity of ownership do serve important public purposes" (A. 197), and that "because of the disruption and losses which could be expected to attend divestiture—resulting in losses or diminution of service to the public—divestiture should be limited to use in only the most egregious cases" (A. 201–202; footnote omitted).

The Commission defined "egregious cases" as those in which only one newspaper and one television station, under common control, served the community."[11] The resulting policy of limited divestiture was, in the Commission's words, one of "minimal diversity" (A. 219)."[12]

[11] There are seven such combinations (A. 242). The Commission also required the separation of nine newspaper-radio combinations in communities with no television stations (*ibid.*).

[12] On petitions for reconsideration, the Commission stressed that the prohibition on cross-ownership would lead to a "gain in terms of diversity * * * [that is] real as well as important" (A. 324). It held, however, that in the case of the incumbent stations, the "important gain in diversity" from separation would be outweighed by "hardship or disruption" (*ibid.*). It did not alter its rules.

C. THE COURT OF APPEALS' DECISION

The court of appeals upheld the Commission's prospective ban on the common ownership of co-located newspapers and broadcast stations (A. 388). It held that the rule neither violated the First Amendment nor exceeded the Commission's statutory authority and was "a rational attempt to promote the highly valued goal of diversity" (*ibid.*). It concluded that "the prospective rules * * * reflect a legislative type policy judgment" (A. 364; footnotes omitted) primarily committed to the Commission's discretion and were neither arbitrary nor capricious (A. 365–374).

The court set aside the Commission's treatment of existing newspaper-broadcast combinations (A. 434). The court recognized that the Commission properly could find that other values outweighed the promotion of diversity, but it concluded that the Commission had not adequately demonstrated why the three competing policies the Commission had invoked outweighed the benefits of diversity (A. 419–427).

The court found that the Commission's concern with preserving local ownership and management was not rationally related to its conclusion. First, Commission precedent had held local ownership to be of little consequence (A. 419). Second, preserving owner involvement with management, though of greater consequence, was not an adequate counterweight because a quarter of the existing co-located stations are not locally owned, and the record contained no evidence

that the rest of the local owners take an active part in station management (A. 419–421). Indeed, the court noted, the Commission had professed a belief that most newspaper-broadcast combinations have separate managements for the newspaper and the broadcast stations (A. 421). Third, by the Commission's own estimate, qualified local residents would be available to buy stations that might be divested (ibid.).

The court found that the Commission's concern with disruption of service was arbitrary in light of the lack of any evidence of service disruption stemming from the Commission's longstanding "practice of routinely approving license assignments" (A. 422–423).[12] Finally, with respect to the Commission's concern that "economic dislocations" might take place because new owners would not have sufficient capital to finance good programming, the court observed that "presumably this would also be the case in voluntary transactions, which the Commission readily permits" (A. 425).

The court, having found that "the Commission could not have rationally concluded the competing policies it offered justified grandfathering" (A. 426),

[12] The court also found merit in the argument of Commissioner Robinson, who would have required divestiture, that holdovers in high-level management often smooth the transition period. "'Indeed, any other action by a new licensee would only reduce the value of his franchise'" (A. 309, quoted at A. 423 n. 100).

remanded the case to the Commission with instructions to apply to all licensees the standards it applied prospectively, subject to appropriate waiver procedures designed to exempt only "those cases where the evidence clearly discloses that cross-ownership is in the public interest" (A. 431, 443).[13] On a motion for stay of mandate, the court stated that the "egregious" co-ownership cases, the existing combinations, and future applicants are "indistinguishable" (A. 443), and that because "the only consistent and court-approved policy in this field" (*ibid.*) is the one expressed in the Commission's prospective rules, the Commission must "take further steps to ensure that everyone [is] consistently treated under the standard already adopted for new license applicants" (*ibid.*).

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 307(a) of the Communications Act of 1934, 48 Stat. 1083, as amended, 47 U.S.C. 307(a), provides that the Federal Communications Commission shall grant an application for a broadcast license "if public convenience, interest, or necessity will be served thereby * * *." For more than 30 years the Commission has taken the position that this standard not only authorizes but also requires it to take into account, in

[13] The court also held that, even if the Commission's decision to leave the existing combinations undisturbed were rational, its refusal to give the same treatment to the combinations in 16 monopoly markets was arbitrary because the Commission failed to show either that there was greater need for divestiture in those markets or that the consequences of divestiture were less harmful (A. 429–431, 441–442).

issuing licenses, the interest of the public in diverse ownership of the media of communications.

The Commission's multiple ownership rules have taken many forms. In *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, the Court dealt with the Commission's rule that any one person may own or have an interest in no more than seven AM stations, seven FM stations, and five VHF television stations. The Court sustained the Commission's rules as properly serving the public interest. 351 U.S. at 202–205. See also *Federal Communications Commission* v. *Allentown Broadcasting Co.*, 349 U.S. 358, 363–364.

Another rule, promulgated in 1943, prohibits one person from controlling more than one station in the same broadcast service in the same community. *Order 84–A: Multiple Ownership of Standard Broadcast Stations,* 8 Fed. Reg. 16065. In 1970 the Commission adopted rules prohibiting one person from acquiring control of more than one full-time broadcast station (of any service) in the same community (A. 33–100). And the Commission's policy of achieving "maximum diffusion of control of the media of mass communications" (*Policy Statement on Comparative Broadcast Hearings,* 1 F.C.C. 2d 393, 394) has led it over the years in appropriate cases to decline to issue broadcast licenses to persons publishing newspapers in the same community as the broadcast service, where competing applicants were willing and able to operate the broadcast station. *Scripps-Howard Radio* v. *Federal Communications Commission,* 189 F.

2d 677 (C. A. D.C.), certiorari denied, 342 U.S. 830; *Seven (7) League Productions, Inc.,* 1 F.C.C. 2d 1597.

The rules in the present case involve the application of firmly-established principles. The Commission found that it is "sound public policy [to place] into many, rather than a few hands, the control of the broadcast medium" (A. 142) and that "nothing can be more important than insuring that there is a free flow of information from as many divergent sources as possible" (A. 200). Much of this seems to be common ground; we do not understand any of the private parties to question the propriety of the Commission's general principles or their application in the other multiple ownership rules. The questions, rather, concern the extent to which the Commission may extend its multiple ownership rules to recognize that newspapers and broadcast stations are part of the same communications market.

I

A. The Commission's decision not to issue new licenses to persons who control newspapers in the same community is not barred by the First Amendment. Its rule neither prohibits nor requires the expression of any views by newspapers or licensees. Newspaper owners do not have a constitutionally protected right to a broadcast license, and denial of a license pursuant to a policy in the public interest does not violate the First Amendment. *National Broadcasting Co., Inc.* v. *United States,* 319 U.S. 190. This Court has recognized that newspapers and broad-

cast stations participate in the same market. United *States* v. *Radio Corp. of America*, 358 U.S. 334, 351–352. Consequently, there is no greater First Amendment objection to a policy designed to deconcentrate ownership of the market than there is to the application of the antitrust laws to the press. This Court has held that the application of the antitrust laws to the press does not violate the First Amendment (*Associated Press* v. *United States*, 326 U.S. 1); to the contrary, because the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public" (*id.* at 20), the Commission's rule, like the application of the antitrust laws, advances the interests protected by the First Amendment.

B. The Commission's rule, which is but one aspect of a broader Commission policy designed to allocate finite broadcast licenses in a manner most likely to produce the expression of diverse views, does not discriminate against owners of newspapers. They, like anyone else, may own seven AM stations, seven FM stations, and five VHF television stations. The rule means only that they may not control stations the signals of which overlap the major area of their newspapers' circulation. This limit on the location of stations and newspapers owned by the same persons is not discriminatory. Under the antitrust laws a person who owns one newspaper in a community could not acquire its major competitor; under the

Commission's rules, a person who owns one television station in a community could not acquire another. It is not "discriminatory" in any way to apply the same principle to prevent the formation of new co-located newspaper-broadcast combinations, because both newspapers and broadcast stations are participants in the same communications market.

C. The Commission's rule serves the public interest and therefore is authoried by statute. *Storer Broadcasting* upheld a prohibition on multiple ownership, and the Commission's rule here is not different in any respect material under the Communications Act from the rule upheld in *Storer*.

II

The Commission's rule prohibiting the formation of new co-located newspaper-broadcast combinations is a reasoned and reasonable exercise of its statutory responsibility to promote the public interest. There is no conclusive evidence concerning the benefits and detriments of cross-ownership, but the Commission need not wait for conclusive evidence before acting. After all, it was required either to permit such combinations to be formed in some circumstances or to forbid them; there is no middle ground. The evidence, if unsatisfactory, is unsatisfactory to support either conclusion.

Regulatory agencies necessarily rely on their experience and wisdom in making decisions like the present one. This Court sustained a similar decision in *Storer*, and it should sustain the present decision

as well. The Commission properly reasoned that promotion of diversity is exceptionally important; in the absence of compelling evidence that achievement of other statutory objectives would be hampered by a decision to diversify ownership of the communications media, the Commission's rule is proper.

III

The Commission, having properly decided that the public interest is disserved by co-located newspaper-broadcast combinations, acted arbitrarily in deciding to grandfather all existing combinations, except for those in which the community has only one newspaper and one broadcast station.

We agree with the Commission and its supporters that giving grandfather treatment to existing combinations would be proper if that were justified by an articulable reason reflecting consistent analysis of the public interest by the Commission. But it has not been so justified.

1. The Commission's concern about local ownership and owner-involvement in management is a makeweight. The Commission consistently has concluded that local ownership as such is unimportant, and there is, in any event, no reason to believe that new owners would be less "local" than the present group, one quarter of which are not "local." Although the Commission has ascribed public interest value to owner involvement in licensee management, many, if not most, of the present combination owners are not involved in management of the licensee; they argued in these pro-

ceedings that the broadcast stations and newspapers were operated independently, an argument the Commission repeats here (FCC Br. 23).

2. The Commission's concern about economic dislocation is fanciful. There is no reason to believe that the transfer of existing licenses from present owners to other owners would have any appreciable effect on national, regional, or local economies. And the Commission disavows any concern about preserving the monetary value of individual licenses, because "economic injury to an existing station is not a separate and independent element to be taken into consideration by the Commission" (*Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 476).

3. The Commission's concern about continuity of service if divestiture should be ordered is inconsistent with the Commission's settled practice of approving transfers without even holding hearings. Approximately 45 transfers for value occur each year, and the Commission did not state that these were disruptive. It did not cite a single example of disruption. It is most unlikely that a new owner would countenance disruption, and thereby impair the value of the license. Harmful instability would occur only if new licensees behaved irrationally, and the Commission gave no reason to believe that they would do so.

4. Counsel for the Commission offer other justifications for the grandfather clause. These were not adopted by the Commission as a basis for its decision

and so should not be considered here. They are, in any event, inadequate.

One such justification is that newspaper-owned stations give superior service. The Commission did not make such a finding. Indeed, this justification amounts to a contradiction by counsel of the Commission's major premise: that more diversity of ownership is a net gain for the public.

The other justification by counsel is that licensees have legitimate expectations of continuity that are entitled to protection against changes in the Commission's policy. Although we do not doubt that this justification is often adequate to support a statutory grandfather clause (see, *e.g., City of New Orleans* v. *Dukes,* 427 U.S. 297; *United States* v. *Maryland Savings-Share Insurance Corp.,* 400 U.S. 4), it is unavailable to the Commission. Grandfather clauses rest on the *legitimacy* of the expectation of continuity, and Section 301 of the Communications Act of 1934, 48 Stat. 1081, 47 U.S.C. 301, provides that licensees have no legitimate expectation of continuity. Congress has deprived the Commission of the authority to promulgate a grandfather clause on expectancy grounds alone. Because the other grounds proffered by the Commission are inadequate, the grandfather provision of the rule is not rationally supported and was properly set aside.

IV

The court of appeals should not, however, have entered an order effectively requiring divestiture of existing combinations. The court's function ended once

it had exposed the error in the Commission's reasoning. Having done so, the court should have remanded the case to allow the Commission to formulate a new rule based on a reasoned application of the governing legal principles.

ARGUMENT

I

THE COMMISSION HAS THE AUTHORITY TO PROHIBIT CO-LOCATED NEWSPAPER-BROADCAST COMBINATIONS

A. THE FIRST AMENDMENT DOES NOT REQUIRE THAT NEWSPAPERS BE ALLOWED TO OWN BROADCAST STATIONS IN THEIR CIRCULATION AREA

Petitioners American Newspaper Publishers Association ("ANPA"), National Association of Broadcasters ("NAB"), and the Post Company ("Post") contend that the First Amendment requires that newspapers be allowed to own broadcast licenses. ANPA Br. 17–26; NAB Br. 25–37; Post Br. 14–16. The gist of their argument is that the government may not impose a burden (inability to own a broadcast station) on someone just because he engages in protected speech as the owner of a newspaper. To deprive newspaper owners of the ability to own broadcast stations, they say, would be to penalize pure speech.

The argument is overstated. The Commissions's rule does not restrict the editorial freedom of either newspapers or broadcasters, and it does not distinguish among newspapers or broadcasters on the basis of the content of their speech.[15] It does not prohibit daily

[15] The case therefore is unlike *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, in which a State instructed a newspaper to publish particular material.

newspapers from owning broadcast stations or stations from acquiring or publishing newspapers; they may do so freely, as long as the major area of the paper's circulation does not overlap the major receiving area of the station. The rule prohibits only common control of a newspaper and a broadcast license that serve the same community.

Suppose that one community has only two newspapers, *A* and *B*. *A* desires to acquire *B* and operate them jointly. The antitrust laws ordinarily would prohibit that acquisition.[16] But the owner of *A* contends that the government may not impose on him a burden (inability to acquire *B*) that would not equally be imposed on a non-newspaper. Thus, the owner of *A* argues, if the owner of an automobile dealership could acquire *B*, then so may he. The argument is identical in form, and in principle, to the First Amendment argument made in this case. This Court already has rejected it in holding that the antitrust laws may be applied to newspapers. "The First Amendment, far from providing an argument against [the] application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public * * *. * * * The First Amendment

[16] Cf. *United States* v. *Greater Buffalo Press, Inc.*, 402 U.S. 549 (acquisition producing concentration in the color supplements market is unlawful).

affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity." *Associated Press* v. *United States*, 326 U.S. 1, 20. See also *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 139–140.

If Congress constitutionally may prohibit the owner of one newspaper from acquiring another, then it, and the Commission acting under its authority, constitutionally may prohibit the owner of one newspaper from acquiring a broadcast station, another method of communication that is part of the same communications "market" for rapid dissemination of information. This Court has recognized that newspapers and broadcast stations operate in the same market, and it has stated (albeit in *dictum*) that the Commission might decide that "antitrust considerations alone" would be enough to cause it to deny some applications for broadcast licenses, "as when the publisher of the sole newspaper in an area applies for a license for the only available radio and television facilities, which, if granted, would give him a monopoly of that area's major media of mass communication." *United States* v. *Radio Corp. of America*, 358 U.S. 334, 351–352. See also *Lorain Journal Co.* v. *United States*, 342 U.S. 143.

The rule prohibiting co-located newspaper-broadcast combinations does not chill or control speech. It simply determines who, among many otherwise eligible applicants, shall not be entitled to operate a particular

broadcast station. There are usually more applicants than available frequencies, and there is no constitutional right to be a broadcaster. *National Broadcasting Co., Inc.* v. *United States*, 319 U.S. 190. In deciding who should be given a license to broadcast, the Commission is entitled to seek to increase the number of different voices in the major media of mass communications. That choice, like the application of the antitrust laws to newspapers, serves the First Amendment because it fosters "the widest possible dissemination of information from diverse and antagonistic sources" (*Associated Press, supra*, 326 U.S. at 20). See also *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 756–757.[17]

The Commission has simply applied to applicants controlling newspapers the rule it previously had applied to persons who desired to obtain a second broadcast license in the same market. They may not do so. See, *e.g.*, *1964 Multiple Ownership Rules*, 2 R.R. 2d 1588; *First Report and Order* (A. 33–100). The Commission's new rules treat newspaper owners and broadcast licensees alike. The Commission is entitled to use its authority over the broadcasting spectrum to promote the legitimate goal of diversity of ownership in the mass communications market.[18]

[17] As the Court has observed, "the 'public interest' standard [of the Communications Act] necessarily invites reference to First Amendment principles." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 122.

[18] Petitioners' reliance on cases such as *Police Department of Chicago* v. *Mosley*, 408 U.S. 92; *Elrod* v. *Burns*, 427 U.S. 347; and *Speiser* v. *Randall*, 357 U.S. 513, is unwarranted. Those cases, and others like them, involved discrimination against particular kinds of speech or political belief. *Elrod*, for example, involved adverse action against members of one political party in order to give benefits to members of another; *Mosley* was a case of discrimination based on the content of speech. The Commission's rules do not discriminate in this way. All newspapers and all broadcast stations are treated alike.

B. THE COMMISSION'S RULES ARE NOT DISCRIMINATORY

Petitioners ANPA (Br. 27–29) and Post (Br. 16–21) contend that the Commission's rule against co-located newspaper-broadcast combinations violates the equal protection component of the Due Process Clause of the Fifth Amendment. To the extent this argument restates the First Amendment objection to the Commission's rule, it is unpersuasive for the reasons discussed above. To the extent this argument has some broader scope, it is unfounded.

Petitioners' reliance on *Buckley* v. *Valeo*, 424 U.S. 1, also is unsound. *Buckley* held that Congress may not attempt to enhance the relative voice of some speakers by partially silencing others. But no one is silenced by the Commission's rules, and they have not been adopted to enhance the relative strength of speech. Nothing the Commission has done will reduce the number of newspapers and broadcasting stations that engage in speech, or tells any speaker to do less speaking. The Commission must allocate scare channels of communication, and it enhances, rather than impairs, First Amendment values by allocating them in a way that increases the number of different speakers. See *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367 388, 390. In *Buckley* Congress attempted to prohibit a person from using his own resources to speak; here, by contrast, no private person owns or has a legitimate claim of entitlement to a broadcast frequency, and the Commission, acting pursuant to law, may consider the public interest in increasing the number and diversity of speakers when allocating those frequencies.

Indeed, it is difficult to identify the discrimination of which petitioners complain. The rule treats all newspapers alike, without regard to their contents. The rule treats newspapers like other media of mass communications; a person cannot acquire a broadcast station in a particular community if he already owns a broadcast station there or if he owns a newspaper there.[19]

Petitioners' argument, then, must be that it is improper for the Commission to treat owners of newspapers the same way as it treats owners of broadcast stations. But because both newspapers and broadcast stations operate in the same market, there is no unfairness in treating them alike.

The rule at issue here is but one manifestation of the Commission's general policy of allocating finite broadcast licenses in the way most likely to produce expression of diverse views by many speakers. See *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* 395 U.S. 367, 390; cf. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra,* 412 U.S. at 112–113 ("[t]he basic principle * * * is 'the right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter' "). The Commission's policy is both reasonable and desirable, for the reasons discussed at pages 30–33, *infra.* Nothing in the Constitution prohibits allocation of the broadcast spectrum in a manner designed to promote diversification of the ownership and operation of the media of communications.

[19] The Commission properly decided to proceed by a general proscription rather than by case-by-case evaluation of the need for diversity. Any attempt to analyze case-by-case the performance of a particular broadcaster or newspaper would involve review of the content of broadcasts and newspaper stories and create the unwelcome prospect of content discrimination. See *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra,* 412 U.S. at 126.

C. THE COMMUNICATIONS ACT AUTHORIZES THE COMMISSION'S RULES

Petitioners ANPA (Br. 29–46), NAB (Br. 12–25), and Dispatch Printing Co. ("Dispatch") (Br. 6–11) contend that the Commission exceeded its statutory authority by adopting the co-ownership rules. Their "elaborate argument * * * does not need an elaborate answer." *United States* v. *Wurzbach,* 280 U.S. 396, 399.

The Commission has broad power to decide what standards for the issuance of licenses best serve the public interest. *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192.[20] Nothing in the Communications

[20] See *United States* v. *Radio Corp. of America, supra* (Commission may refuse to grant broadcast license to a person owning a newspaper where that would create a communications monopoly). See also *Scripps-Howard Radio* v. *Federal Communications Commission,* 189 F. 2d 677 (C.A. D.C.), certiorari denied, 342 U.S. 830 (in a comparative hearing the Commission may deny an application for a broadcast license on the ground that the applicant owns a newspaper in the same community); *McClatchy Broadcasting Co.* v. *Federal Communications Commission,* 239 F. 2d 15 (C.A. D.C.), certiorari denied, 353 U.S. 918.

Act precludes the Commission from finding that greater diversity of ownership of the media of communications is in the public interest. The Commission for years has barred persons from owning more than one license for the same type of broadcast service in a single community, and petitioners apparently concede that this rule is within the Commission's authority. The propriety of the rule at issue here follows directly, because if the "public interest" is served by diverse ownership of broadcast stations, it is served at least as well by diverse ownership of the media of communications in general. There can be no doubt that the Commission's rule is within its statutory authority, provided that it is sufficiently justified."[21]

Petitioners rely on an opinion by Hampson Gary, the Commission's first general counsel (A. 445–465). Mr. Gary concluded that the Commission may consider newspaper ownership as one public interest factor in deciding whether to issue a broadcast license but may not disqualify newspaper owners as a class from being licensees. The Commission properly pointed out, however, that Mr. Gary's comments concerned only absolute disqualification of newspaper

[21] Petitioner ANPA contends (Br. 29–31) that the Commission's rule is unauthorized because it denies a hearing to a newspaper owner who seeks a broadcast license. But if the Commission may properly deny all applications by newspapers for broadcast licenses within the same community, it necessarily follows that there is no point in holding a hearing, for the outcome would be foreordained. See *United States* v. *Storer Broadcasting Co.*, *supra*, 351 U.S. at 205; *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 620–621.

owners, and they do not confront the problem of this case. Because the Commission allows the owner of a newspaper to hold a broadcast license in any community other than the community served by the newspaper, there is no need to consider whether a total disqualification would be proper (A. 144). See also A. 376–378. Moreover, the Commission never formally adopted Mr. Gary's views, and, even if it had, it would be entitled to change its mind. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 169–170.

Petitioners' reliance (ANPA Br. 37–47; NAB Br. 19–20; Dispatch Br. 8–11) on legislative statements made after the enactment of the Communications Act is subject to the same objection as their reliance on Mr. Gary's opinion. Like Mr. Gary's opinion, these statements concern a total prohibition of newspaper ownership of broadcast licenses rather than a limitation on the *location* of licenses that newspaper owners properly may hold. Because the legislative comments were not addressed to limitations on location of licenses, petitioners' "recitation of legislative history is less than persuasive" (A. 378 n. 41).[22]

[22] What is more, petitioners overlook the principle that "statutes are construed by the courts with reference to the circumstances existing at the time of the passage" (*United States* v. *Wise*, 370 U.S. 405, 411), and that subsequent legislative history is not helpful unless it culminates in legislation clearly demonstrating the view of Congress as a whole about the prior statute. Compare *Califano* v. *Sanders*, 430 U.S. 99, with *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 734 n. 14, and *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132.

II

THE RULE PROHIBITING THE CREATION OF NEW CO-LOCATED NEWSPAPER-BROADCAST COMBINATIONS IS A REASONED AND REASONABLE EXERCISE BY THE COMMISSION OF ITS MANDATE TO GRANT LICENSES IN THE PUBLIC INTEREST

The Commission thoroughly canvassed the arguments for and against prohibiting co-located newspaper-broadcast combinations (A. 134–146, 153–188). It found, and the court of appeals agreed (A. 395–408), that the attempts to determine whether cross-ownership is quantifiably "harmful" have been largely unsuccessful.[23] A study undertaken by the Commission's staff found that, on the average, newspaper-owned stations performed slightly better than other stations in some respects (A. 198 n. 26, 230–241).[24] Two studies conducted by the RAND Corp. concluded that neither benefit nor detriment of cross-ownership could be established (A. 967–982; notes 8 and 9, *supra*). Another study found numerous examples of detrimental consequences of cross-ownership and criticized the methodology of the RAND studies (A. 990–1051). In light of the difficulty of conducting controlled experiments in broadcasting, it is quite possible that disputes of this sort can never be resolved.

Faced with these conflicting positions, the Commission properly relied primarily on a policy judgment that transcended the evidentiary disputes: because

[23] We do not attempt here to discuss the arguments pro and con. They were comprehensively summarized by the Commission.

[24] But see note 39, *infra*, for a discussion of this study.

there is a policy, rooted in the Constitution itself, favoring "the widest possible dissemination of information from diverse and antagonistic sources" (*Associated Press* v. *United States, supra,* 326 U.S. at 20), the Commission decided to enhance diversity of ownership of the media of communication in each community (A. 143).

That decision is a proper application of the statutory public interest standard, which necessarily reflects First Amendment values (see note 17, *supra*). Broadcast stations (especially television) and newspapers are the public's primary source of information concerning public affairs (A. 207–208). It is unrealistic to expect true independence of operation of commonly owned stations and newspapers (A. 200),[25] and the Commission therefore concluded that to grant a broadcast license to a person operating a newspaper in the same community would squander an opportunity to increase by one the number of mass media communicators in that community. It is not known, and perhaps never can be known, whether this is a "better" outcome in some absolute sense. But it is

[25] And if, in some cases, commonly owned newspapers and broadcast stations operate absolutely independently, then nothing is lost by a rule requiring ownership as well as editorial policy to be independent. The owner of a newspaper could not complain that the rule deprived him of the opportunity to speak if, in fact, he had insulated himself from the operation of the broadcast station and delegated to someone else the absolute authority to operate the station. In other words, if newspaper and broadcast station already are, or would be, operated independently, no single speaker is using two methods of communication, and the ban on cross-ownership would reduce only his investment opportunities, not his opportunities to speak.

consistent with First Amendment premises to believe that, other things being equal, more diversification of ownership is better than less.

The Commission's conclusion lacks conclusive empirical support, but regulatory agencies necessarily rely on their experience and wisdom in making decisions like the present one. As there is no proof that concentration of ownership harms anyone, so there is no conclusive empirical proof that allowing cross-ownership serves the "public interest" within the meaning of the Communications Act. Yet the Commission was required either to permit co-located newspaper-broadcast combinations or prohibit them; it had no other option. The evidence did not conclusively support either course, and the Commission's choice, being a reasoned and reasonable one and consistent with its statutory authority, should be upheld. See *United States* v. *Storer Broadcasting Co., supra* (upholding the Commission's multiple ownership rules despite the absence of any proof that multiple ownership caused actual harm to the public); cf. *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49, 60–62 (upholding legislative prohibition of pornography despite the absence of conclusive evidence that pornography is harmful).[26]

[26] See also *Whalen* v. *Roe*, 429 U.S. 589, 597, which upholds a state statute requiring the identification of purchasers of certain drugs because the statute "represents a considered attempt" to deal with a problem and is "manifestly the product of an orderly and rational legislative decision." The Court found it immaterial that the necessity for the rule had not been proved, because people must act in even the most important affairs on unprovable assumptions.

ANPA argues (Br. 46–50) that the Commission did not adequately explain why it changed its rules, which previously had allowed the creation of new co-located newspaper-broadcast combinations. But the Commission clearly stated that the economic and technological considerations that influenced its policy choices in the 1940s and 1950s no longer hold sway." At one time the Commission granted broadcast licenses to persons who also owned newspapers because that was an effective way to obtain financially responsible licensees, many of them pioneers of the broadcast medium (A. 188–191, 193–196). But today broadcasting is more mature, and many "qualified and experienced applicants can be expected to step forward" (A. 190) for the available licenses. The Commission's decision that future licensing should be designed to enhance diversity is a considered adaptation of administrative policy to a change in circumstances. *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 137–138.

III

THE COMMISSION DID NOT ADEQUATELY JUSTIFY ITS DECISION TO TREAT EXISTING CO-LOCATED NEWSPAPER-BROADCAST COMBINATIONS DIFFERENTLY FROM PROPOSALS TO CREATE NEW COMBINATIONS

A. THE COMMISSION HAS ACTED ON THE PREMISE THAT PROMOTION OF DIVERSITY IS AN IMPORTANT ELEMENT OF THE PUBLIC INTEREST

In formulating its prospective rules in this case, the Commission adopted the premise that promotion of

[27] The Commission also properly took into account the consequences of its prior policy in deciding whether that policy should

(Continued)

diversity in the ownership of the media of communications is one of the most important elements of the public interest the Commission is charged with fulfilling. In so doing, the Commission built on 30 years of precedent. Its earlier decisions, which we have discussed at pages 4–7 and 13–15, *supra*, repeatedly took the course that increased diversity. It limited any person to operation of no more than seven stations of one type in different communities, and no more than one station of any type (except AM–FM combinations) in one community.

The Commission reasoned in the present case not only that it is "sound public policy [to place] into many, rather than a few hands, the control of the broadcast medium" (A. 142) but also that "the idea of diversity of viewpoints from antagonistic sources is at the heart of the Commission's licensing responsibility * * * [and] nothing can be more important than insuring that there is a free flow of information from as many divergent sources as possible" (A. 200).

This language may be, as the Commission now contends (FCC Br. 35), nothing more than hyperbole. The court of appeals recognized as much (A. 418). But this hyperbole is the basis of a great deal of the Commission's policy, including the prospective rules at issue in this case. It represents a conclusion of fundamental importance for the Commission's operations. Although some things may be more important than diversity in particular cases, the Commission has the

(Continued)
be altered. The Commission pointed out, for example, that its policy had led to substantial concentration of media ownership (A. 161–165).

responsibility to demonstrate what these things are, and why they are more important.

The Commission's rules contain a grandfather clause that insulates incumbent licensees from challenge on diversity grounds, both in rulemaking and in future license renewal proceedings (A. 218). The decision by the Commission to compromise one of its most fundamental principles and to settle for a policy of "minimal diversity" (A. 219) [28] must be scrutinized under a standard of review that is familiar. An agency's policy choices may not be arbitrary, and its decisions may not be internally inconsistent.[29] The Commission had a responsibility to explain why it departed from its own principles in reaching the decision to include a grandfather provision in its rules. We turn to an analysis of that decision.

[28] The Commission stated that "it is unrealistic to expect true diversity from a commonly owned station-newspaper combination" (A. 200, 323 n. 9). If this premise is correct, then the grandfather provision of the rules sacrifices significant opportunities for diversity. A general disestablishment of co-located newspaper-broadcast combinations would have increased the number of independent major media outlets (newspapers and television station combined) by at least 20 percent in 68 of the 74 cities, and in 55 of the 74 Standard Metropolitan Statistical Areas, that had cross-ownership when it issued the *Second Report and Order*. A. 971–978 (computed from Tables 8 and 9 of RAND Corporation Study R–1585–MF).

[29] See 5 U.S.C. 706; *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 284–286; *Atchison, Topeka & Santa Fe Railway Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 806–808; *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416.

B. THE INTERESTS ON WHICH THE COMMISSION RELIED TO SUPPORT ITS GRANDFATHERING DECISION APPEAR INSUBSTANTIAL FOR THAT PURPOSE, AND THE COMMISSION DID NOT ADEQUATELY EXPLAIN WHY THOSE INTERESTS OUTWEIGH THE VALUE OF DIVERSE MEDIA OWNERSHIP

The Commission concluded that disestablishing existing co-located newspaper-broadcast combinations would be more harmful than helpful. Although the value of diverse ownership is the same whether diversity is brought about in new licensing proceedings or by separating existing combinations, the Commission explained that separation would cause harm to three other values that it believes are important. These competing values, the Commission stated, are (A. 196):

1. Preserving local ownership and owner involvement with management
2. Avoiding economic dislocation
3. Preventing disruption and instability of licensees' service

The Commission summarized its position by stating (A. 197) that "stability and continuity of ownership do serve important public purposes." The rule it adopted demonstrates that, in the Commission's view, "stability and continuity of ownership" are more important than the benefits of diversity.

The court of appeals stated (A. 418), and we agree, that the Commission properly may conclude that other interests are more important than diversity and call for less than complete diversity. But the Commission must reach such a conclusion in a reasoned way, and we submit that its rationale fails on its own terms.

1. Preserving local ownership and owner involvement with management

The Commission expressed concern that an order separating existing co-located newspaper-broadcast combinations would undermine local ownership of broadcast stations and erode the role of owners in management, two values that the Commission has sought to foster in the past. The Commission now seems to have retreated from this justification,[30] and properly so.

As the court of appeals observed (A. 419), the Commission consistently has concluded that local ownership is not in itself a significant objective in broadcast licensing. The Commission did not purport to change its mind on this subject, and its expression of concern about local ownership (A. 197) therefore seems to be a makeweight.[31]

The Commission has, by contrast, given significant weight to owner involvement with management. The

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[30] The Commission confines its discussion of this justification to a single footnote (FCC Br. 38 n. 63). Other petitioners supporting the Commission's grandfather provisions concede that this rationale is of "peripheral importance" (Channel Two Br. 49). ["FCC Br." refers to the Commission's brief as petitioner in No 76-1461.]

[31] Indeed, the Commission admits (FCC Br. 26) that one quarter of all co-located newspaper-broadcast operations are not "locally" owned. Consequently, even if the objective of encouraging local ownership were entitled to weight, it would not justify the creation of a grandfather provision for these licensees. It would not, moreover, justify allowing the renewal of "local" cross-ownership against a competing application by another qualified "local" party.

invocation of that objective here, however, would be difficult to sustain, because the Commission lacked evidence that new owners would be less likely than the present owners to be involved in the management of the broadcast stations.

First, as the Commission recognized (A. 161) and the court of appeals emphasized (A. 421), most if not all of the persons who own newspapers are *not* involved in the management of their co-located broadcast stations.[32] If this is so, then grandfathering in the interest of preserving non-existent owner-involvement in station management would be irrational. If, on the other hand, the newspaper owners actively manage their broadcast stations, the Commission's failure to order more extensive divestiture is inconsistent, for the Commission stated that owner-involvement would involve "an important point" about which it "would have to be concerned" and that if newspaper owners were actively involved in managing broadcast stations "it might have been necessary for the Commission to act to require divestiture in many more situations * * *" (A. 219). The Commission (and the owners) cannot have it both ways.

Second, the Commission overlooked the likelihood—given the fact that most persons who own both newspapers and broadcast stations are not now involved in management of the broadcast station—that dissolution of the combinations could lead to a substantial

[32] See also Channel Two Br. 12; FCC Br. 23 ("the record indicated that most commonly owned newspapers and broadcast stations were operated separately").

increase in the amount of involvement of (the new) owners in station management. Broadcast stations are an attractive investment, and "qualified and experienced applicants can be expected to step forward" (A. 190) if licenses should become available. In sum, the Commission has failed to offer any reason to believe that the disestablishment of present combinations would lead to a diminution of either local ownership or owner involvement in management.[33]

2. Avoiding economic dislocation

The Commission expressed concern that "local economic dislocations are also possible as a result of the vast demand for equity capital and wide-scale divestiture could increase interest rates and affect selling price too" (A. 197). This reasoning is, as the court of appeals remarked, "not entirely clear" (A. 424).

The Commission's concern about "economic dislocations" may amount to a forecast that divestiture would affect interest rates, but the Commission has no economic expertise in that field and did not purport to rely on any economic forecasts or studies of the effects on the economy of disestablishment of

[33] The Commission's argument (FCC Br. 38 n. 83) that it "was not unreasonable" for the Commission to "take [into] account" these considerations misses the point: in the absence of evidence to support the Commission's concerns, and in light of the fact that the Commission has not previously given local ownership weight, it was arbitrary to allow these considerations to serve as counterweights to the acknowledged, important benefits of diversity.

co-ownership. In any event, it strains credulity to assert that the transfer of several hundred million dollars of existing assets from one group of investors to another would have any discernible effect on the national economy.[34]

The Commission might have been referring, instead, to the possibility that subjecting broadcast licenses to a forced sale (or transfer) would decrease the value of the licenses and hence reduce the price they otherwise could bring for their owners.[35] But if the Commission was concerned about the potential financial loss to investors, it overlooked the principle that "economic injury to an existing station is not a separate and independent element to be taken into consideration by the Commission in determining whether it shall grant or [deny] a license." *Federal Communications Commission* v. *Sanders Brothers Radio Station,* 309 U.S. 470, 476. "The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license." *Id.* at 475; see also *Ashbacker Radio Co.*

[34] The gross national product of the United States in 1976 exceeded $1.6 trillion (Economic Report of the President, January 1977, Appendix B, Table B–1, p. 187). We have been informed by the Federal Reserve Board that the aggregate amount of capital newly invested during 1976 in all forms of debt and equity was approximately $300 billion. The aggregate amount of existing capital traded or sold (say, on a stock exchange) is many times greater.

[35] Counsel for the Commission have not attempted to support the Commission's decision on this reasoning. In the court of appeals, the Commission's counsel explicitly disclaimed (Br. 34–39) any intent on the part of the Commission to spare licensees from economic loss.

v. *Federal Communications Commission,* 326 U.S. 327, 331–332. What is more, such a concern would be inconsistent with the Commission's conclusion, stated earlier in its opinion, that separation would not cause loss to the station owners (A. 118–119), and the Commission furnished no reason to doubt the accuracy of that estimate.[36]

Counsel for the Commission argued in the court of appeals (see A. 425), as they do here (FCC Br. 38 n. 84), that divestiture "might have an adverse economic impact ultimately affecting the quality of program service." Counsel refer to A. 177–178, where the Commission summarized the argument "made by several broadcast interests" that new owners would be required to pay high prices for the broadcast licenses and hence would lack the resources to provide quality programming. But the Commission did not accept this argument, and the arguments of counsel are not a substitute for reasoned administrative decisionmaking. *Securities and Exchange Commission* v. *Chenery Corp.,* 318 U.S. 80, 92–95; *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 168–169.

In any event, this explanation falls short of supporting the Commission's decision, because it does not explain why new owners are any more likely than

[36] Another portion of the Commission's opinion anticipated that the licensees would realize gain on the transfer or sale of their licenses (A. 211 n. 45). It may be that the Commission was concerned that a requirement of separation would diminish the amount of gain in particular cases, but for the reasons stated in this text this is not a legitimate consideration.

present owners to be short of investment capital or operating funds. If the returns generated by a station are sufficiently high to justify a handsome selling price, the licensee (present or future) would be unlikely to jeopardize his return by allowing deterioration of programming quality. Quality programming may be expensive, but unless it yields a return or is required by regulations neither the present owner nor any future owner would be willing to provide it. There is simply no reason to believe that present licensees are more willing or able as a class than potential future licensees to provide the funds necessary to support quality programming.

This economic reality is reflected in the Commission's own practices. The Commission routinely approves voluntary transfers of licenses, often for large sums of money. During the six years before its decision in the present case, the Commission granted, without holding a hearing, approximately 270 transfers or assignments for value of commercial television licenses (A. 423 n. 99).[37] In none of these cases did the Commission express concern that the new owner would be unable or unwilling to support quality programming, and there is no evidence that programming quality subsequently deteriorated as a result of high transfer prices. There is no greater reason for such

[37] The Commission approved 678 license assignments during those six years without a hearing. Although, as the Commission argued in the court of appeals, many of the transfers were *pro forma* (for example, transfers, on the death of the licensee, to his or her heirs), the Commission admitted that approximately 40 percent of the transfers were for value to new owners.

concern here than there was in any of those license transfers.

3. Continuity of service

The Commission stated that divestiture would jeopardize "continuity of operation * * * as the new owner would lack the long knowledge of the community and would have to begin raw" (A. 197). This statement is ambiguous.

To the extent the Commission was concerned about "knowledge of the community," its statement repeats the concern about local ownership, and it is insubstantial for the reasons we have discussed above. To the extent the Commission meant that transfer of a license is inevitably (or even sometimes) an unwelcome disruption, its concern is inconsistent with its practice of routinely approving applications for transfer. The Commission did not cite a single instance in which a transfer of a license has caused disruption or lack of necessary continuity and, so far as we are aware, could not have cited one. The Commission approved without a hearing the transfer for value of approximately 270 licenses between 1969 and 1975; it seems most unlikely that the transfer over a five-year period of at most 79 television stations owned by persons who own newspapers in the same communities would cause significant adverse consequences if the prior transfers have caused none. Indeed, the Commission did not alter its policy of allowing transfers with only the most cursory attention; this decision to continue processing transfers as before appears to

reflect a recognition that there is no harm in the process.[38]

Commissioner Robinson stated in a separate opinion (A. 309) that new licensees would likely retain the station's personnel for some time to smooth the process of transition, and that "any other action by the new licensee would only reduce the value of his franchise." The Commission did not respond to this observation, which seems unanswerable. There is no reason why new licensees would "begin raw" in any case in which continuity were desirable; attributing to new licensees a willingness to permit (or cause) harmful disruption in service is attributing irrationality, and the Commission has not offered any reason to believe that owners (present or potential) disserve their own interests.

[38] The Commission and its supporters refer to the Commission's policy against trafficking in broadcast licenses. FCC Br. 24; Channel Two Br. 46–47. The Commission, concerned about the large number of substantial transfer applications made during a licensee's first term, adopted rules that require a hearing on most applications to transfer a license during that time. *Applications for Voluntary Assignments or Transfers of Control*, 25 Fed. Reg. 12898 (1960); *Procedures on Transfer and Assignment Applications*, 32 F.C.C. 689 (1962). The rules do not apply to transfers after three years. *Procedures*, *supra*, 32 F.C.C. at 691–692. The Commission explained that when a substantial transfer occurs after three years of operations, the problems of trafficking and disruption are so likely to be insubstantial that there is no need for even a hearing on those questions. *Id.* at 691–692. The antitrafficking rules therefore do not support the Commission here; to the contrary, the rationale for not holding a hearing on any transfer after three years of ownership undermines the Commission's arguments.

4. Other justifications

Our discussion to this point has addressed all of the justifications that the Commission offered for the grandfather clause of its proposed rule. In this Court the Commission's attorneys offer additional arguments. These should not be considered, because the Commission's opinion, not the arguments of its attorneys, is the subject of judicial review. *Securities and Exchange Commission* v. *Chenery Corp., supra; Burlington Truck Lines* v. *United States, supra.* We nevertheless briefly consider the arguments of counsel.

The Commission's brief states that newspaper-owned stations have "established traditions of service" (Br. 24) and that a "careful study by the Commission's staff * * * even showed some superiority [of newspaper-owned] * * * to other stations" (*ibid.*). It argues that "[d]ivestiture introduce[s] the danger of disrupting this proven, superior service—to the detriment of the public interest" (*ibid.*). One may legitimately wonder why, if newspaper-owned stations give "superior" service, the Commission decided not to allow additional combinations. The answer is that the Commission did not find any superiority of service, and the Commission's major premise was that greater diversity would be preferable.[39] Counsel may not

[39] The Commission referred in passing (A. 198 n. 26) to a staff study that, the Commission stated, showed "an undramatic but nonetheless statistically significant superiority in newspaper owned television stations in a number of program particulars." This study, which is reproduced at A. 230–241, did not show gen-

(Continued)

attempt to contradict this rationale by positing that newspaper-owned stations provide "superior" service.

Several petitioners (*e.g.*, Channel Two Br. 35, 45) and counsel for the Commission (FCC Br. 27–29) contend that the very fact of incumbency gives a licensee an interest in retaining his license, and that this interest is more important than the potential

(Continued)

eral superiority of newspaper-owned stations; it showed only that newspaper-owned stations on the average are slightly better in some respects than other stations on the average. It did not rule out the possibility (even the likelihood) that many newspaper-owned stations are inferior to the average. The Commission's grandfather clause, however, covers all stations, the superior and the inferior alike.

Moreover, the Commission did not adopt or endorse the findings of its staff report. It could not properly have done so. The report was not made available to the parties for comment in advance of the Commission's decision, and a "journey outside the record" to rely on the study would itself have been a ground to set aside the Commission's order. *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 528. We do not contend that all reference to extra-record information is improper, but the staff study here was a unique document that deserved scrutiny before being adopted. Its conclusions are quite different from those of studies that were in the record (see A. 990–1051) and were subject to methodological criticism. For example, most of the variables in its analysis were "dummy" variables that may be influenced by common factors; the study did not attempt to exclude "multicollinearity" of this sort; because the authors of the study did not ensure true independence of the "independent" variables, the results are not reliable. We believe that Commissioner Robinson accurately analyzed the state of the evidence in writing (A. 293): "similar studies by a leading economic scholar of communications (which have not been effectively rebutted) indicate no significant difference in news or public affairs programming, and no significant difference in the character or diversity of other program types."

gains of increased diversity. The Commission's brief speaks, for example, of the "inherent hardship, quite apart from any question of financial gain or loss" (Br. 27), that accompanies divestiture. The Commission argues that the expectancy interest a licensee acquires in holding that license is a solid reason for a grandfather provision in the cross-ownership rules.

We do not doubt that Congress could decide that the legitimate expectations of persons in retaining broadcast licenses—or in continuing to carry out any other endeavor—are by themselves adequate to justify exemption from changes in governing legal rules. The Court held in *City of New Orleans* v. *Dukes*, 427 U.S. 297, that protection of legitimate expectations is a rational basis on which to draw legislative distinctions. Grandfather clauses are routinely employed by legislatures and by administrative agencies to protect legitimate expectations, and their employment is a reasonable means of implementing policy changes. See, *e.g.*, *United States* v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4; *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554."

But Congress has specifically denied to broadcast licensees the sort of interest that would make grand-

" Grandfather clauses may be constitutionally required when legislation could not properly operate retrospectively. Compare *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (retrospective application usually is within legislative power), with *Berger* v. *Board of Psychologist Examiners*, 521 F. 2d 1056 (C.A. D.C.) (grandfather clause necessary to save statute from due process challenge).

father treatment by the Commission automatically reasonable. A license to broadcast typically runs for three years, and "no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." Section 301 of the Communications Act of 1934, 48 Stat. 1081, 47 U.S.C. 301. The recipient of a license must waive "any claim to the use of any particular frequency * * * because of the previous use of the same * * *." Section 304, 48 Stat. 1083, 47 U.S.C. 304. Prior to the Communications Act there was no legitimate expectation of continuity (*Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 282), and the statute makes it impossible for new interests to arise. *Federal Communications Commission* v. *Sanders Brothers Radio Station, supra; Ashbacker Radio Co.* v. *Federal Communications Commission, supra.*

Because there is no legitimate expectancy interest beyond the term of the license, the Commission turns instead to an argument that a licensee has a legitimate expectation of renewal of the license if he performs satisfactorily (FCC Br. 27). To some extent this is a bootstrap argument—an attempt to manufacture the legitimate expectation that Congress so clearly withheld.

We agree with the Commission, however, that a license ordinarily should be renewed if the licensee's performance is superior: "*superior* performance should be a plus of major significance in renewal proceedings" (*Citizens Communications Center* v. *Federal Communications Commission*, 447 F. 2d 1201, 1213 and n. 35 (C.A. D.C.)(emphasis in original)).[41] See also *Greater Boston Television Corp.* v. *Federal Communications Commission,* 444 F. 2d 841, 854 (C.A. D.C.), certiorari denied, 402 U.S. 923. Licensees often must make substantial investments of time and money in order to achieve superior performance; they would be less likely to make such investments if, every three years, they were required to start from scratch in attempting to retain their licenses.[42] The Commission's policy of giving great weight to superior performance as a reason to renew a license thus makes it possible for prudent men to dedicate their lives and their assets to broadcasting; without such an expectation broadcasting could not hope for excellence.

But the premise of the Commission's grandfather clause was not that newspaper-owned stations give generally superior performance; the prospective rule

[41] The court also stated that "[i]nsubstantial past performance should preclude renewal of a license. The licensee, having been given the chance and having failed, should be through." 447 F. 2d at 1213. The Commission apparently agrees with this principle, because it speaks of renewal expectancies only for licensees that have "given good service" (FCC Br. 27).

[42] The value of a broadcast station often significantly exceeds the value of its tangible assets. The difference represents the capitalized earnings stream of the station, some of which is attributable to the value of the license itself and some of which is attributable to "goodwill," or listener loyalty, built up through prudent and successful operation of the station. The value of the latter investment is irrevocably lost if a license is not renewed; the owner in that circumstance can sell only the tangible assets of the station.

against additional co-located newspaper-broadcast combinations rests on the premise that additional diversity would be valuable. The Commission did not limit its grandfather clause to newspaper-owned stations that have given truly superior service; the rule applies to all, without any attempt to differentiate with respect to quality of service. The Commission did not rely on the need to protect investors against catastrophic loss in order to attract good managers and needed capital into broadcasting; a rule requiring divestiture does not impose the large loss that would result from denial of renewal. A licensee could recoup its investment by selling the license to a third party (or by swapping with the owner of a newspaper in another community).

The specter of loss would be present only if the Commission were to cancel the outstanding licenses; divestiture, however, involves sales and transfers, not cancellations. The Commission contemplated that licensees would be able to sell or exchange their licenses without significant loss (A. 118–119, 211 n. 45). The rationale for recognizing a legitimate expectancy interest in the renewal of licenses has little bearing, then, on the present problem, for the licenses would be renewed and simply transferred to other persons who, on the Commission's own reasoning, are likely to improve the diversity, and thus the quality, of broadcast service as a whole.[43]

[43] The Commission itself has declined to employ grandfather clauses where there was no need to do so. See, *e.g.*, *United States* v. *Midest Video Corp.*, 406 U.S. 649, 673–674 n. 31 (plurality opinion) (approving the Commission's refusal to recognize grandfather

The Commission's decision may be upheld only if there is a satisfactory reason to believe that a grandfather clause is in the public interest. For the reasons we have discussed at pages 36–44, *supra*, the reasons offered by the Commission are insubstantial, in light of unrepudiated, established Commission policies and practices, and the court of appeals therefore properly set the Commission's decision aside."

rights in cable television); *Section 214 Certificates*, 21 F.C.C. 2d 307, affirmed *sub nom. General Telephone Co. of Southwest* v. *United States*, 459 F. 2d 846 (C.A. 5); *Order 84–A: Multiple Ownership of Standard Broadcast Stations*, 8 Fed. Reg. 16065.

" We submit, however, that the court of appeals erred in holding that the Commission's divestiture requirement directed to combinations that constituted a monopoly in their communities was arbitrary (A. 429–431, 441–442). The court properly noted that divestiture poses no greater danger to the public interest in the grandfathered markets than in monopoly markets (A. 429). That, however, is only half of the public interest balance. The Commission's determination that the need for diversity in a monopoly market is especially great is unquestionably rational as a matter of policy. See *United States* v. *Radio Corp. of America*, *supra*, 358 U.S. at 351–352. The court's belief that "[d]ivestiture * * * may be more useful in the larger markets" than in the monopoly markets (A. 430) is an improper substitution of the court's judgment for that of the Commission. Consequently, although the court of appeals' invalidation of this aspect of the Commission's rules would be unimportant if this Court should hold (as the court of appeals did) that the Commission must order separation of *all* existing combinations (that do not individually qualify for a waiver), the court of appeals' decision in this respect should be set aside if, as we argue at page 52, *infra*, the case should be remanded for further consideration by the Commission rather than for the automatic entry of divestiture orders. Reversal of this portion of the court of appeals' judgment will permit divestiture to proceed in the monopoly markets while the Commission is reconsidering its position with respect to the other existing combinations.

IV

THE COURT OF APPEALS SHOULD HAVE REMANDED THE CASE TO ALLOW THE COMMISSION TO RECONSIDER ITS DECISION IN LIGHT OF THE PROPER LEGAL STANDARDS

Although the court of appeals correctly held that the Commission's decision to insulate the existing combinations from challenge on diversity grounds was not rational agency action, we agree with the Commission (FCC Br. 42) that the court should not have directed the Commission to adopt a rule requiring the separation of all combinations.

Except in extraordinary situations, "the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration." *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20. Accord, *National Labor Relations Board* v. *Food Store Employees*, 417 U.S. 1, 9; *South Prairie Construction Co.* v. *Local No. 627, International Union of Operating Engineers*, 425 U.S. 800, 806. The court of appeals did not find that any extraordinary circumstances counseled against that course here. Consequently, after properly identifying the flaws in the Commission's reasoning, the court of appeals should have returned the case to the Commission, leaving the agency free to formulate a new rule of its choosing based on a reasoned application of the governing legal principles.

CONCLUSION

The judgment of the court of appeals should be affirmed insofar as it upholds the Commission's decision with respect to the creation of new combinations and declares that the Commission's determination not to require divestiture of most existing combinations constituted arbitrary and improper decision making. The judgment should be reversed insofar as it sets aside the Commission's requirement that monopoly combinations be divested and the case remanded with instructions to enforce that part of the Commission's order. The remainder of the court of appeals' judgment should be vacated and the case should be remanded with instructions that it be returned to the Commission for further proceedings.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
JOHN H. SHENEFIELD,
Assistant Attorney General.
LAWRENCE G. WALLACE,
Deputy Solicitor General.
FRANK H. EASTERBROOK,
Assistant to the Solicitor General.
BARRY GROSSMAN,
ROBERT B. NICHOLSON,
BRUCE E. FEIN,
Attorneys.

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